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In the Supreme Court of the United States

OCTOBER TERM 1957

No. 844

CEDAR CREEK OIL AND GAS COMPANY, a corporation; INTERNATIONAL TRUST COMPANY, a corporation; H. C. SMITH; SUSAN M. WIGHT; and W. B. HANEY

Petitioners

vs.

FIDELITY GAS COMPANY, a corporation; MONTANA-DAKOTA UTILITIES COMPANY, a corporation; and SHELL OIL COMPANY, a corporation

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF MONTANA-DAKOTA UTILITIES CO., FIDELITY GAS CO., AND SHELL OIL COMPANY IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit affirming the judgment of the District Court (Pet. 25-45) is reported in 249 F. 2d 277.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on the 22nd day of October, 1957, and a Petition for Rehearing was denied on December 12,

1957. The jurisdiction of this Court is invoked under 28 *U. S. C.* 1254(1).

QUESTIONS PRESENTED

The United States District Court for the District of Montana held, in a quiet title action brought by petitioners, that petitioners are estopped and barred by laches and waiver from asserting termination of the operating agreements under which Fidelity Gas Co. and Shell Oil Company claim rights in lands covered thereby. The Court of Appeals for the Ninth Circuit affirmed this decision on the basis of estoppel without passing upon the questions of laches and waiver, and it further held that the District Court's judgment was sustainable on the ground that petitioners failed to prove that the agreements had expired. The questions presented are:

(1) Whether the Court of Appeals properly affirmed the District Court's judgment that petitioners were estopped from prosecuting this suit against respondents.

(2) Whether the Court of Appeals erred in holding that the judgment of the District Court was sustainable on the ground that petitioners failed to sustain their burden of proving that the operating agreements had expired.

STATEMENT

This action was brought to quiet title to certain oil leases and lands owned or controlled by the petitioners in Fallon County, Montana. The leases of petitioner and others are held by respondent Shell Oil Company pursuant to identical forms of operating agreements voluntarily made in 1934 and

1935 by petitioners or their predecessors with respondent Fidelity Gas Co. (Def. Ex. 2; Pet. 48; R. 230). Under these agreements Fidelity on April 10, 1951, made a sublease to Shell (Def. Ex. 5; R. 235) of all of its rights under this operating agreement.

The operating agreement covers all horizons below 2000 feet in approximately 90% of the acreage located on the Cedar Creek Anticline in eastern Montana (R. 192). Its purpose is to permit cooperative exploration and development of the lands as a single geologic structure (R. 192). It provides that, in the event of a commercial discovery at any point on the structure, the development program shall extend outward from the point of discovery thus progressively resulting in the development of the lands of petitioners and all others under the agreement (R. 193). The precise location of wells—whether on or near petitioners' lands or distant therefrom—is not material. The District Court found that the area is one geologic structure (R. 192). The Court of Appeals concurred (Pet. 37).

The area involved is one in which, although numerous wells had been drilled, there had been no commercial discovery of oil prior to the commencement of Shell's operations under its sublease (R. 196).

After drilling three wells Fidelity continued its program through a succession of subleases, under a provision of the operating agreement which provided that in the event the first well failed to encounter commercial production, Fidelity or its sublessee had the option to drill additional test wells

> "* * * under like terms and conditions and at such times as shall be deemed by it to be good oil field practice, having due regard that the drilling operations hereunder are purely exploratory and specula-

tive, and also having due regard to weather and road conditions" (Pet. 49-50).

Although petitioners contend that in its operations Fidelity did not meet the test of "good oil field practice," they failed to introduce any evidence as to what constitutes such practice. The Court of Appeals, after concurring with the District Court in disposing of the case under the rules of estoppel, held that the petitioners had the burden of proving what constitutes good oil field practice and that they failed to maintain the burden, and that judgment for respondents could be granted on this issue alone (Pet. 44-45).

Fidelity by its letter of April 27, 1951, to all petitioners notified them that it had subleased to Shell and that Shell would commence drilling within ninety days after April 10, 1951 (Pl. Ex. 26; R. 374).

Shell commenced its first well on the structure on July 8, 1951, which was completed as a commercial well in January, 1952 (R. 195-196). Shell's Richey well on an adjacent area was completed as a commercial well in July, 1951 (R. 643). By reason of Shell's operations a boom occurred in the values of leases in the area. Prices rose from about $2.50 per acre to an average of from $300 to $500 per acre (R. 650-654).

In the meantime petitioners, although claiming that Fidelity had abandoned its rights in the area in the late 1930's, did nothing. Petitioner H. C. Smith on July 16, 1951, wrote a letter to Fidelity and Montana-Dakota in which he declared "forfeited and cancelled" any rights which they might claim to have (Pl. Ex. 30; R. 387). He did not send any notice to Shell. He thereafter conferred with representatives of Montana-Dakota and Fidelity who

again advised him of Shell's operations (R. 389-392; R. 563-565), following which he continued to do nothing.

This action was commenced by the filing of the original complaint on December 3, 1952. Shell was not made a party until the filing of the amended complaint in February, 1953.

The District Court decided the case against petitioners on laches, waiver and estoppel, applying to the unusual facts of the case the settled principles of law, from which the Court did not deviate. The Court of Appeals, in an exhaustive consideration of the case, and applying the settled principles of the cases, including those cited by petitioners in their brief in this Court, affirmed the District Court on the issue of estoppel, without passing upon the applicability of laches and waiver. It also held that petitioners had failed to prove that the operating agreement (termed a sub-lease by the Court) had expired (Pet. 44-45).

ARGUMENT

A WRIT OF CERTIORARI IS NOT GRANTED TO REVIEW MATTERS OF EVIDENCE

This Court in *Magnum Import Co. v. Coty*, 262 U. S. 159, 163, said:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

The court below and petitioners agree that the essential elements of an estoppel are those set forth in *Gypsy Oil Co. v. Marsh*, 121 Okla. 135, 248 Pac. 329 (Pet. 15, 33); that the burden of proving all of these elements is upon the party asserting the estoppel, each citing *Waddell v. School District No. 2*, 74 Mont. 91, 238 Pac. 884 (Pet. 18, 34) and that such burden must be discharged by clear, convincing and satisfactory evidence, each citing *Fiers v. Jacobson*, 123 Mont. 242, 211 P. 2d 968 (Pet. 15, 34). Thus, the Court of Appeals and petitioner are in complete accord as to the law applicable to the defense of equitable estoppel. Petitioners' quarrel is with the facts found from the evidence. Their attempt to couch their objections to such facts in terms of errors of law is thinly disguised. They are, in substance, asking this Court to review such findings of fact, notwithstanding the complete review by the Court of Appeals sustaining the findings of the District Court.

In the reasons advanced by petitioners for granting the writ (Pet. 10-12), statements such as the following are made:

> (1) The decision denies to petitioners the right to a decision on the merits by the application of the doctrine of estoppel where no impelling reasons support its application and where no single element of estoppel has been proven.

The District Court and the Court of Appeals have both determined to the contrary (R. 178-181; Pet. 33-43).

> (2) * * * The decision itself reveals that there is no testimony * * * either direct or circumstantial to establish any of the five required elements of an estoppel.

To the contrary, both the District Court and the Court of Appeals found each of these five elements to be established by the evidence (R. 178-181; Pet. 33-43).

> (7) c. [The decision] is contrary to the universally accepted rule that all of the elements of an estoppel must be proven.

The District Court and the Court of Appeals have determined that all essential elements were proved (R. 178-181; Pet. 33-43).

Petitioners are not entitled to another hearing of this matter in this Court.

No conflict of decisions

The petitioners assert that the decision of the Court of Appeals conflicts with no less than 16 decisions of other courts, including the Supreme Court of the United States, the Circuit Courts of the Ninth and other Circuits, and the supreme courts of various states including Montana. That petitioners were indiscriminate in selecting such cases is strikingly illustrated by the fact that rules of law laid down in four of them, *Gypsy Oil Co. v. Marsh*, 121 Okla. 135, 248 Pac. 329; *Waddell v. School District No. 2*, 74 Mont. 91, 238 Pac. 884; *Fiers v. Jacobson*, 123 Mont. 242, 211 P. 2d 968; and *Gerard v. Sanner*, 110 Mont. 71, 103 P. 2d 314, are discussed and followed by the Court of Appeals. See Petition 33, 34.

There is no conflict with decisions of the Supreme Court of the United States

It is noteworthy that of the decisions of the Supreme Court of the United States claimed by petitioners to be in

conflict with the instant decision only *Sauder v. Mid-Continent Petroleum Corporation*, 292 U. S. 272, is discussed (Pet. 22-23).

The *Sauder* case is clearly distinguishable. It involved a forfeiture of the undeveloped portion of a lease for failure of the lessee to comply with the implied covenant to develop after discovery. In the instant case there had been no discovery prior to the time of alleged termination so the court was not concerned with further development after discovery, and the operating agreement specifically provided (Def. Ex. 2; Pet. 49-50; R. 230) that the operator could hold the premises so long as it continued its exploratory drilling in accordance with good oil field practice. The Court of Appeals held that petitioners had the burden of proving a failure on the part of respondents to comply with good oil field practice and that they had failed to carry this burden (Pet. 44-45). Thus the *Sauder* case, which did not involve equitable estoppel nor proof of failure to comply with the express terms of an agreement, in no way conflicts with the instant decision.

Petitioners assert that the decision below is in conflict with four other decisions of this Court, namely: *Hammond v. Hopkins*, 143 U. S. 224 (Pet. 15); *Johnston v. Standard Mining Co.*, 148 U. S. 360 (Pet. 10); *Patterson v. Hewitt*, 195 U. S. 309 (Pet. 15); and *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587 (Pet. 15). Petitioners apparently do not deem any of these cases worthy of discussion to point out the alleged conflict, and after examination respondents find no conflict. These cases were all on the subject of laches. They sustain the decision of the District Court in the instant case insofar as the decision was based upon laches. The Court of Appeals did not consider the defense

of laches because it found that the District Court's judgment could be sustained on the issue of estoppel as well as upon the failure of petitioners to carry the burden of proof on the question of good oil field practice.

THERE IS NO CONFLICT WITH OTHER DECISIONS OF THE NINTH CIRCUIT

The cases cited by petitioners on this point are *City of Roswell v. Mountain States Telephone and Telegraph Company*, 78 F. 2d 379; *Gillons v. Shell Co. of California*, 86 F. 2d 600; and *DeLamar Mines of Montana v. Mackay*, 104 F. 2d 271 (Pet. 15). The *City of Roswell* case is not a Ninth Circuit case but is from the Tenth Circuit. Petitioners cite (Pet. 11), among authorities from other circuits, *Buchler v. Black*, 226 Fed. 703, and *Medallion Oil Co. v. Hinckley*, 92 F. 2d 155, both of which are Ninth Circuit cases.

Gillons v. Shell, *Buchler v. Black* and *Medallion Oil Co. v. Hinckley*, *supra*, all involve laches rather than estoppel. They are not in any respect in conflict with the Court of Appeals holding in the instant case. Moreover they sustain the decision of the District Court on the rule of laches.

DeLamar Mines v. Mackay, *supra*, not only does not conflict with the instant case but is clear authority for sustaining the District Court's decision on both laches and estoppel.

THERE IS NO CONFLICT WITH DECISIONS OF OTHER CIRCUITS

In *City of Roswell v. Mountain States Telephone and Telegraph Company* (Tenth Circuit), *supra*, the court found that one of the essential elements of estoppel, name-

ly, reliance, was lacking. In the instant case, the District Court and the Court of Appeals both found that all essential elements of estoppel, including reliance, were present.

Brewster v. Lanyon Zinc Co. (Eighth Circuit) 140 Fed. 801 (Pet. 23) was similar to the *Sauder* case. (Respondents' discussion of *Sauder* at page 8 is equally applicable to *Brewster*). It involved a breach of an implied covenant to develop a lease after discovery. Equitable estoppel was not involved.

Winn v. Shugart (Tenth Circuit) 112 F. 2d 617 (Pet. 11), was a laches case, and like other laches cases cited above, supports the decision of the District Court.

THERE IS NO CONFLICT WITH DECISIONS OF THE SUPREME COURT OF MONTANA

As previously pointed out the Court of Appeals discussed and applied the principle of law of three of the decisions of the Montana Supreme Court, namely: *Fiers v. Jacobson*, 123 Mont. 242, 211 P. 2d 968; *Gerard v. Sanner*, 110 Mont. 71, 103 P. 2d 314; and *Waddell v. School District No. 2*, 74 Mont. 91, 238 Pac. 884, which are now claimed by petitioners to be in conflict with the instant decision.

Bowes v. Republic Oil Co., 78 Mont. 134, 252 Pac. 800 (Pet. 15), is clearly distinguishable and was discussed and distinguished by the Court of Appeals. It involved a lease which required drilling on the leased premises, or within a radius of three miles, by July 1, 1921. The lessee failed to drill at all within the term. The lease therefore terminated at the end of its primary term.

Berthelote v. Loy Oil Co., 95 Mont. 434, 28 P. 2d 187 (Pet. 23), was a case dealing with implied covenants for further development and the marketing of products. (Respondents' discussion of *Sauder* at page 8 is equally applicable to *Berthelote*). It did not involve equitable estoppel or any other principle of law at variance with the holding of the District Court or the Court of Appeals.

THE DECISION IS NOT IN CONFLICT WITH ESTABLISHED RULES OF LAW

The petitioners claim that the decision is in conflict with universally accepted rules of law relating to the burden of proof on estoppel (Pet. 11-12). This claim cannot be accepted in view of the express application by the Court of Appeals of those "universally accepted rules." In speaking of the essential elements of an estoppel it stated (Pet. 33, 34):

> "The burden of proving each of these elements is upon appellees * * * and such proof must be by clear, convincing and satisfactory evidence."

The District Court and the Court of Appeals found that all these elements had been proved.

CONCLUSION

Petitioners' brief and their arguments in support of the issuance of a writ clearly show that the case is not one of broad application and importance; it does not deal with important legal principles as to which courts are in conflict; but it involves merely an attempt to obtain a second review of a decision on fact issues.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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